United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-1107 B P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

ANGELO BERTOLOTTI,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

SANFORD M. KATZ
Attorney for Appellant
299 Broadway
New York, N.Y. 10007
(212) 349-7755

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel. (212) 447-5358

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STATUTES

IN THE
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UNITED STATES OF AMERICA,
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v.

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PRELIMINARY STATEMENT

The appellant Angelo Bertolotti, along with 28 other defendants, was charged in one count of a 9 count indictment with conspiring to distribute and possess with intent to distribute Schedule I and Schedule II narcotic drug controlled substances in violation of §§812, 841(a)(1) and 841(b)(1)(A) of Title 21 of the United States Code.[1]

In addition to the 29 defendants,[2] who were all charged

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1. The government proceeded to a trial on a superseding indictment filed on January 6, 1975 (A.32). The original indictment, which was filed on June 18, 1974, did not differ at all from the superseding indictment insofar as the appellant was concerned (A.43).

All references preceded by "A" are to an appendix jointly filed by appellants Capotorto, Bertolotti, Guerra, Thompson, and Camperlingo. All references preceded by "R" are to the evidentiary phase of the trial which commenced on January 8, 1975. All refernces preceded by "RP" are to the preliminary phases of the trial which took place on January 7, and 8, 1975.

2. One unindicted co-conspirator, Louis Lepore, was named in the indictment itself.

in the conspiracy count, the government provided defense counsel with two separate lists containing the names of 31 individuals whom it claimed were co-conspirators.

Count I of the indictment,[3] the conspiracy count, set forth 13 overt acts, all of which related to cocaine transactions. The 8 substantive counts charged various defendants, but not the appellant Bertolotti, with distributing cocaine (A.34-7).

The trial commenced on January 6, 1975, in the United States District Court for the Southern District of New York before the Honorable Robert L. Carter and a jury. 17 defendants[4] ultimately proceeded to trial and on January 30, 1975, the jury found Bertolotti guilty as charged.[5]

All of the defendants who were charged with the substantive crime of cocaine distribution were acquitted of those charges.[6] Seven defendants, including Bertolotti, were convicted on the conspiracy count.[7]

On March 4, 1975, Bertolotti was sentenced by Judge Carter to a term of 5 years imprisonment; a $5,000 fine; and 3 years special parole (A.15).

This appeal followed.

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3. All references to "the indictment" are to the superseding indictment.

4. The defendants Ernest Coraluzzo; Albert Rossi, Jr., who testified for the government; Robert Browning; Gerald Rubin; Charles Guida; and Maria Marrero, pleaded guilty prior to trial. The defendant Peter Cosme was severed. The remainder of the defendants were never apprehended.

5. The jury acquitted 8 defendants: Webster Bivens, Steven Crea, Joseph Lepore, Philip Cimino, Thomas Vasta, Susana Sherman, Anita Coraluzzo, and Nathaniel Arnold. It could not agree as to the defendants Marilyn Greco and Cathy Spangler.

6. The defendants Crea, Joseph Lepore, Cimino, Arnold, and the appellant Louis Guerra.

7. The appellants Joseph DeLuca, James Angley, James Capotorto, Raymond Thompson, Joseph Camperlingo, and Louis Guerra.

QUESTIONS PRESENTED

1. Whether in a prosecution charging a conspiracy to distribute cocaine it was improper for the trial court to admit evidence of marijuana transactions, a) in which the appellant was involved, and b) in which other co-conspirators were involved, all as part of the charged conspiracy?

2. Whether under the circumstances of this case it was improper for the trial court to admit evidence of heroin transactions in which the appellant was not involved?

3. Whether under the circumstances of this case it was improper for the trial court to admit evidence of thefts of monies by co-conspirators from expectant narcotics purchasers where no narcotics were ever distributed, or ever intended to be distributed, and regarding which the appellant had no involvement?

4. Whether the government proved by a fair preponderance of the non-hearsay evidence the appellant's participation in the charged conspiracy?

   (a) Whether, assuming the existence of but a single conspiracy, the government established the appellant's guilt beyond a reasonable doubt?

5. Whether the government failed to establish the existence of the single conspiracy charged beyond a reasonable doubt?

   (a) Whether the trial court's charge to the jury concerning the issue of multiple conspiracies was fatally deficient?

   (b) Whether the appellant was prejudiced by the introduction of hearsay testimony and physical evidence resulting from the government's proving multiple conspiracies?

6. Whether under the facts and circumstances of this case, there should be a reversal of the appellant's judgment of conviction because of the government's failure to heed prior admonitions of this Court relating to multiple-defendant conspiracy prosecutions?

THE EVIDENCE

As already noted, the indictment makes no mention of any drug other than cocaine. Nevertheless, the government was permitted, over repeated and vigorous objection by defense counsel, to introduce a mass of evidence relating to the distribution of both heroin and marijuana.

In its opening statement to the jury, the prosecution revealed that the conspiracy

> ". . . involves dealings by some 29 defendants during the whole year of 1973. The transactions include cocaine, marijuana and heroin." (R.43-4)

After all this irrelevant but highly prejudicial testimony had been admitted, the government narrowed the scope of the conspiracy excluding any marijuana transactions from its ambit.

Not only do we have present here a virtual host of separate conspiracies, but a mass of testimony relating to robberies, kidnappings, possible corruption of federal drug enforcement and other officials, with which this appellant was saddled but with which he had absolutely no connection.

Thus, any analysis of the evidence against Bertolotti must be viewed in the larger context of the terrible prejudice that resulted from the introduction of all of that extraneous matter.

BERTOLOTTI AND COCAINE

The only testimony which even purported to relate Bertolotti to anything charged in the indictment came from the defendant Albert Rossi, Jr., the principal prosecution witness.

Rossi testified that in May or June, 1973,[8] Capotorto and Thompson came up from Florida and met with him and Coraluzzo in New York (170-1).

According to Rossi, Capotorto informed him that he had come up to New York to buy a kilo of cocaine to take back to Florida (R.171). Capotorto also informed Rossi that four individuals, Thompson, Camperlingo, Bertolotti[9] and himself "had all chipped in money" to purchase the cocaine (R.172). Rossi believed the amount involved was "17 to 19 thousand dollars" (ibid).

Rossi thereupon obtained two kilograms of cocaine from Guerra, one of which was supposedly pure and the other diluted, sold one kilo to Capotorto and Thompson and gave them the other "on consignment," whereupon "they got in their car and they drove to Florida" (R.174-5).

In June, 1973, Rossi went to Ft. Lauderdale, Florida, where he and Coraluzzo met with Capotorto and Thompson (R.178). At this meeting, according to Rossi, Thompson told him that the one kilogram of cocaine taken on consignment was unsuitable for "shooting," to which Rossi expressed his lack of concern and demanded payment (ibid).

Thompson thereupon gave Rossi $5,000 in payment for that kilo of cocaine (R.178-9).

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8. (R. 171).

9. Rossi testified that he had not known or met Bertolotti (R. 172).

The next day, after testifying extensively about matters that bore no relationship to Bertolotti, Rossi was again asked about his going to Florida to obtain payment for "some narcotics" that he had given Capotorto and Thompson (R.320).

> "Q: Did you speak to anyone down there about payment for those narcotics?
> "A: Yes, I did.
> "Q: Who was that?
> "A: Mr. Angelo Bertolotti and Joseph Camperlingo". (R321)

Rossi testified that a meeting was held in June or July in Camperlingo's home at which he, Coraluzzo, Capotorto, Thompson and Bertolotti were present (ibid).

Asked by the prosecutor to relate who said what at that meeting, Rossi testified:

> "A: Well, at that individual meeting they were making preparation in going to get a shipment of marijuana." (R.321-2)

An objection to any testimony concerning marijuana was overruled (R.322),[10] and Rossi proceeded to relate what was said at that meeting.

> "A: Joey Camperlingo told—said to Ernie Coraluzzo and myself that Ray Thompson was getting ready to go on a plane and make payment to people, I believe it was in the Bahamas, for marijuana." (R.324)

Again objection was made to testimony concerning marijuana, and overruled (R.324-5).

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10. It should be noted that at the very outset of the trial, the Court directed "that any objection that has been made by any counsel will inure to the benefit of all the defendants unless that defendant specifically wishes to remove himself from the benefit of the objection" (RP. 44-5). This also applied to all motions (R.15).

Rossi went on—

> "He said that Ray Thompson was going, I believe, to the Bahamas and pay people there for a load of marijuana that was going in, and at that meeting Angelo Bertolotti and Joseph Camperlingo and Ray Thompson said that the cocaine that they received in May or June from New York was sniffing cocaine and that they were having a problem with it, and at that meeting we made an agreement that if they would get X amount, in other words, a certain amount, 500, 600 pounds, of marijuana and give it to us, we would take the money that they owed us for the cocaine off the bill" (R.325).

Rossi further testified that there was more discussion at that meeting about when the marijuana would be arriving "and what they should do with the remainder of the coke" (R.326).

Rossi testified that he had another meeting in Florida either in July or August, 1973, at which Camperlingo, Capotorto, Thompson, Bertolotti, as well as unindicted co-conspirators Louis Lepore and Nicholas DiGeorgio were present (R.327).

Asked by the prosecutor to tell the jury who said what, Rossi testified as follows:

> "A: Well, the first two or three days that they were there little Ray Thompson says that they were having a problem getting the marijuana off the boat due to the condition of the water. In other words, the water was rough and they couldn't get the marijuana off the boat. After two or three days the marijuana was taken off the boat and Ray Thompson and Joseph Camperlingo and Angelo Bertolotti said that we should make preparations to bring it up to New York" (R.328)

Rossi was then asked:

"Q: Was there anything else said at that meeting?,

to which he replied,

"A: They were still talking about the cocaine, they couldn't get rid of it" (ibid)

In contrast to that rather paltry response, Rossi went on at great length to describe the preparations for, as well as the actual transportation of, the 600 pounds of marijuana from Florida to New York and its ultimate distribution there (R.328-333).[11]

Rossi testified that he and Coraluzzo "took" about 200 pounds of the marijuana after it was received in the New York area and sold the rest to Louis Lepore, Guerra and Bivens (R. 331).

On cross-examination by counsel for Capotorto and Thompson, Rossi testified that he never paid for the 600 pounds of marijuana (R.537).

Rossi never met with, saw, or had any other dealings with Bertolotti. Other than what has just been set forth there was no other evidence linking Bertolotti to the charged conspiracy.

In summary, the record reveals that out of his presence Capotorto told Rossi in May or June, 1973, that Bertolotti was one of four persons who had "chipped in" to buy a kilogram of cocaine. That was followed by two meetings at which Bertolotti was present where preparations for the importation and ultimate distribution of marijuana was discussed. Rossi did not attribute a single word relating to cocaine, or to any other drug, to Bertolotti. There is literally no competent, non-hearsay testimony in this trial

11. A motion to strike all of Rossi's testimony concerning that marijuana transaction as being unrelated to the indictment was denied (R.336).

regarding Bertolotti.

It is indeed unfortunate that counsel for Bertolotti, who also represented Camperlingo, chose not to cross-examine the only prosecution witness who gave any substantive testimony against him (R.757). Nor did counsel, in his summation, ever analyze the evidence or do more than merely mention Bertolotti's name in passing (R.2363-2376).

Thus, a glaring discrepancy, now so apparent upon a reading of the record, which would have cast doubt upon Rossi's testimony that he ever discussed cocaine with Bertolotti at the two meetings in Florida, was never brought to the jury's attention.

Rossi testified that at the first meeting where Bertolotti was present, an agreement had been reached whereby Rossi (and Coraluzzo) was to receive 500 or 600 pounds of marijuana as payment for the 1 kilogram of unpaid cocaine (R.325).

That was the only mention of cocaine made. Yet at a later point in his direct examination, Rossi testified that after he received the 600 pounds of marijuana, Camperlingo came to New York in September and complained that he had been "beat," (i.e. cheated) and that Rossi and his partners owed him money for the marijuana (R.337-8).

Rossi testified that *he* agreed to give Camperlingo 125 pounds of marijuana as compensation (R.338) and that his partner, Coraluzzo, agreed to give Camperlingo $2,000 or $3,000 (R.339).

Ironically, the trial court based its determination that the evidence at the conclusion of the government's case establishing Bertolotti's membership in the conspiracy was his agreement to give 500 or 600 pounds of marijuana to Rossi in payment of the cocaine which Capotorto and Thompson had earlier obtained from Rossi (R.1822).

EVIDENCE OF OTHER CONSPIRACIES

1. *The Flynn Robbery*

Rossi testified that in July or August, 1973, he met with Angelo Iacono who informed him "that he was partners with an individual by the name of Franklin Flynn who had connections in South America to get vast quantities of cocaine" (R.187)[12]

Rossi told Flynn "that all the cocaine he could get I would buy it" (R. 188).

In August or September, 1973, Iacono came up to New York and Rossi, Capotorto and Guida met him at Kennedy Airport (R.190-1).[13]

Iacono brought an ounce or more of cocaine with him which Rossi found to be good (R.191-191a). In September, 1973, Flynn called Rossi and told him to come to Florida "and pick up the goods" (R.192-3).

On September 22, 1973 (R.201), Rossi, Coraluzzo, Louis Lepore, Browning, Angley, DeLuca, and Gary Pearson[14] all flew down to Ft. Lauderdale, Florida, for the purpose of robbing cocaine from Franklin Flynn (R.196).

There then followed a vivid description of the armed robbery (R.207-210).[15] A suitcase[16] filled with cocaine was obtained (R.210).

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12. Both Iacono and Flynn were indicted but never apprehended.

13. Rossi testified that Flynn called from Florida to advise him that Iacono was coming to New York "with goods" (R.190).

14. An unindicted co-conspirator who testified for the government.

15. A defense motion to strike all of this testimony was denied (R.208).

16. The one suitcase subsequently became "suitcases" filled with cocaine (R.213).

Rossi then went on to testify how he and his associates brought the cocaine back to New York (R.212-4). There was a vivid description of Rossi having the cocaine tested by Rubin who exclaimed "that it was the best cocaine he had ever tested" (R.218). Rossi, Coraluzzo, Spangler and Greco then packaged the cocaine placing it in 26 or 28 fifteen-ounce packages (R.218-20).

(a) *Distribution of the "Flynn" Cocaine*

Rossi then proceeded, for more than 100 pages of the record on his direct examination, to describe his efforts, along with Coraluzzo, to distribute the cocaine stolen from Flynn.

At the end of September, or the beginning of October, 1973, Rossi and Coraluzzo received $20,000 from Rubin for a kilogram of cocaine (R.226-230). The jury was then told at great length about negotiations and the ultimate distribution of a substantial quantity of the "Flynn" cocaine to the defendant Cimino; unindicted co-conspirators George Toutoian and Louis Lepore; and DeLuca (R.232-241). Rossi testified that during this same period, he and Coraluzzo sold Guerra two 15-ounce packages of the "Flynn" cocaine (R.243-4). There was a transaction involving the distribution of that cocaine with the defendants Guida and Bivens (R.248-9).

Rossi testified about the sale of half a kilogram of the "Flynn" cocaine to the defendant Cosme with Pearson as the intermediary (R.250-2).

Rossi then regaled the jury about his secreting the remainder of the "Flynn" cocaine after he learned in late October, 1973, that there was a warrant outstanding for his arrest (R.254-264). While a fugitive, Rossi continued the

distribution of the "Flynn" cocaine through Angley; the defendants Marrero and Sherman; and an unindicted co-conspirator called Sally Goose (R.264-8).

There was testimony about the sale of a quarter of a kilogram of the "Flynn" cocaine by the defendant Marrero and a co-conspirator called Carey, both acting on Rossi's behalf (R.268-70).

Marrero also testified for the prosecution regarding that transaction (R.1405-1431; 1444-1459).

Rossi testified about additional sales of the "Flynn" cocaine to Joseph Lepore and Louis Lepore (R.271-3); to the sale of a kilogram of the cocaine through Marrero and Carey in Boston (R.274-6); and another quarter kilogram sale of that cocaine to Carey through DeLuca (R.280-4).

Rossi testified that in November, 1973, he met with Arnold to discuss the latter's buying cocaine and Arnold making two subsequent "buys" through Guida (R.288-293).

There then followed extensive testimony about Rossi and Coraluzzo, first negotiating with, and then, in December, 1973, selling, a large quantity of the "Flynn" cocaine to Crea and Artuso for a total of $15,000 (R.293-306).

From that transaction, Rossi went on to testify about a kilogram deal in December, 1973, in which Angley was to be the intermediary (R.308). Relating what Guida had supposedly told him, Rossi testified that Guida and Angley were in separate cars at a parking lot in the Bronx preparing to give the buyer of the cocaine a sample when law enforcement officials "started to close in on them" (R.308-313).

Later on in the trial, the prosecution called John Serrano as a witness who testified that he was the prospective buyer

of that particular cocaine from Angley which was aborted by the presence of federal agents (R.1122-5).

Prior to that occasion, Serrano had received a sample of the cocaine contained in a cigarette box from Angley, which was introduced at the trial (R.1117; Govt. Exh. 1).[17] This was the only physical evidence of any drugs introduced at the trial.

Rossi testified that in December, 1973, after the abortive attempt to sell the cocaine to Serrano, Guida told him that he had another customer, Arnold (R.313-4). Rossi further testified that he received about $12,000 or $13,000 from Guida from the resulting sale to Arnold (R.316)

Gary Pearson, a former air traffic controller employed by the Federal Aviation Administration,[18] was called by the prosecution regarding his role in the charged conspiracy. After describing his fall from respectability, Pearson went on to detail his dealings in drugs, first as a courier in 1971, and then graduating to a dealer in March, 1973 (R.911). Toward the very end of his direct examination, Pearson testified that he did not know Bertolotti (R.1024). However, for more than 200 pages of the trial record he was permitted to testify about events and persons with which Bertolotti had absolutely no connection.

Pearson first testified about the sale of an eighth of a kilogram of heroin in March, 1973, to a Victor Ortez in the Bronx.[19] He then went on to describe in vivid detail and at great length his participation in the Flynn robbery (R.913-930).

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17. Serrano was accompanied on that occasion by a government informant identified only as "Roberto" (R.1637). Serrano gave the cigarette box containing the cocaine to "Roberto" who turned it over to Agent Bell (R.1639).

18. (R. 907)

19. Ortez was not named as a conspirator.

As did Rossi, Pearson detailed his role in the distribution of the stolen cocaine (R.930-941; 1000; 1016).

Over vigorous objection and after a *voir dire* out of the jury's presence,[20] Pearson was allowed to testify about drug transactions with the appellant Guerra, from mid-July to October, 1973 (R.1007).

These six transactions between them relating to cocaine, heroin and marijuana had nothing to do with the charged conspiracy and had absolutely no connection to Bertolotti (R.1008-1016).

The evidence relating to the robbery of the cocaine from Flynn and the subsequent distribution of that cocaine was totally unrelated to Bertolotti. He neither participated in the robbery nor had anything to do with the distribution of the cocaine, either as packager, buyer, seller, or intermediary. There was absolutely no evidence presented that would even suggest that he had any knowledge, concern, or stake in those transactions.

Clearly, the Flynn robbery and what transpired thereafter was at the core of the conspiracy. All thirteen overt acts alleged in the conspiracy count relate to either the planning and preparation of the robbery, or to the subsequent packaging and distribution of the cocaine that was stolen.[21]

Bertolotti is alleged in overt act number 1 to have met with Flynn, Silverio, Iacono and Rossi in Miami in July, 1973, to discuss the distribution of cocaine (A.33). There was absolutely no testimony at the trial to substantiate that.

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20. (R.990-999).

21. All of the eight substantive counts related to the distribution of the cocaine stolen from Flynn. As already noted, Bertolotti was not charged in any of those counts.

Thus, Bertolotti's participation in the very conspiracy alleged in the indictment was not established at the trial (see Point II, *infra*).

Moreover, a mass of testimony was allowed to be introduced which, while extremely prejudicial, had absolutely no relation to the conspiracy charged in the indictment, nor any connection to Bertolotti.

2. *The Lucas-Mengrone Affair*

Rossi testified that in August or September, 1973, in Mount Vernon, New York, he met with unindicted co-conspirators Peter Mengrone, Frank Lucas and an individual named Morris, at which meeting Lucas told Rossi that he was interested in obtaining 10 kilograms of heroin (R.340). About a week later, so Rossi related, Lucas gave Mengrone about $30,000 as part payment for the heroin, which Mengrone turned over to Rossi (R.341-2).

Rossi had no intention of delivering the heroin to Lucas and, in effect, stole the money from him (R.343-5).

Rossi, through his partner Coraluzzo and their friends thereupon engaged in a charade with Mengrone, the middleman in this transaction, about "delivery" of the non-existent heroin to Lucas. The jury was treated to an exhibition of more than 50 wire-tapped telephone conversations over a two day period among a host of individuals in which threats and counter-threats of kidnappings and bodily harm were made.

None of this testimony, not one word, related in any manner or fashion to Bertolotti.[22]

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22. A fuller recitation concerning these wiretaps is contained in the brief of appellant Guerra.

3. *The Matthews-Harrison Affair*

Rossi testified that in either March or April, 1973, he met unindicted co-conspirator Frank Matthews in a New York City bar where they discussed "buying heroin on a large quantity, like 30 or 50 kilos" (R.347-8). As a result of this meeting, Matthews gave Rossi $250,000 for heroin purchases, and another prospective purchaser of heroin, the unindicted co-conspirator Harold Harrison, gave him $120,000 (R.348).

Rossi then related how he and Coraluzzo proceeded to the latter's home with a suitcase containing $250,000 of Matthews' money, where the following colloquy between them ensued:

> "I (Rossi) told Ernie Coraluzzo, 'What are we going to do'?
> He (Coraluzzo) said, 'We are going to beat them.'
> I said, 'How are we going to beat them? They know where my father and mother live(s)'." (R.349)

Upon learning that Matthews and Harrison were holding Capotorto[23] as hostage for the return of their money, Rossi and Coraluzzo fled to the Bahamas (R.349-50).

As with the Flynn robbery and the Lucas-Mengrone "rip-off", the theft of $350,000 from Matthews and Harrison under the guise of selling them heroin had absolutely nothing to do with Bertolotti.

4. *The Festa Tape*

As already set forth, virtually all of the testimony given by Rossi concerning Bertolotti related to marijuana transactions. But there was more.

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23. Rossi testified that he was first introduced to Matthews in March or April, 1973, by Capotorto (R. 351.)

The trial Court permitted, over timely objection and a motion to strike,[24] Agent George Festa to testify about a telephone conversation with Camperlingo on May 3, 1974, and a meeting with him and Thompson in Florida the following day (R.1534). In addition, the court allowed the government to play for the jury, again over objection, a tape recording of that meeting (R.1549-50).

Agent Festa testified on direct examination that while in the prosecutor's office, Rossi dialed a telephone number and then handed the telephone to him whereupon he introduced himself to Camperlingo as Rossi's friend (R.1531-5). Festa informed Camperlingo that he would be going to Florida the next day, which he did (R.1535).

On cross-examination Festa testified that his purpose in meeting with Camperlingo was,

> "to determine if he (Camperlingo) had a connection in the Federal Government whereby he was obtaining information and smuggling narcotics into the country" (R.1554).[25]

Festa acknowledged that his investigation of Camperlingo had nothing to do with this indictment (R.1555-6).

Agent Festa testified in great detail about the May 4, 1973, meeting with Camperlingo and Thompson at the Four O'Clock Club in Ft. Lauderdale, Florida.

That conversation began with Festa asking Camperlingo if Rossi had informed him that he, Festa, "had some stuff down south" (R.1537).

Camperlingo acknowledged that he had heard this from Rossi but had found it to be "a little unbelievable" because Rossi had told him that Festa had "150 kilos" (ibid).

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24. R. 1532-3; R.1548-9.

25. Festa testified that it was Rossi who told him that Camperlingo had such a "connection" (R.1557).

Festa testified that he told Camperlingo that he only had 15 kilos but that he had access to 150 kilos from his supplier (R.1538).

According to Festa,

> "Mr. Camperlingo indicated that he would be able to pick it up and bring it into the Miami area for me" (ibid).

There then ensued a discussion about price with Camperlingo expressing his reluctance to do any business with Rossi because the latter "had moved him around a couple of deals, that as a result of that he got burnt," but did express a willingness "to do business" with Agent Festa (R.1538-9).

Camperlingo then indicated that he was going out of town to purchase 2,000 pounds of marijuana and that Thompson would complete the arrangements for his "deal" with Festa (R.1539).

Agent Festa recounted how Camperlingo and he discussed "problems involved in smuggling operations," going on to testify in some detail about what Camperlingo told him about those problems (R.1540-1).

At this point, the trial court evinced its concern about the entire line of Festa's testimony, but did nothing to curtail it (ibid).

Camperlingo departed the meeting whereupon Agent Festa and Thompson continued their discussions with the latter relating to Festa "the procedure used in smuggling into the United States" (R.1541).

Festa went on to regale the jury with Thompson's smuggling adventures (ibid).

The agent testified that Camperlingo returned to their meeting whereupon he stated that,

> ". . . he (Camperlingo) was 99 per cent sure that he could guarantee bringing the merchandise up

into the United States, that it would be no problem, that he's brought thousands of pounds of grass and coke into the United States" (ibid).

There was yet additional testimony from Festa about Camperlingo's techniques used in smuggling marijuana and cocaine into this country (R.1542).

Festa further testified that upon his return to New York, he spoke with Camperlingo on the telephone who told him that before they could do any deal together he, Festa, would, in effect, have to be cleared, and that one of the ways of doing that,

> *"was for me to get together with a partner of his, an individual by the name of Angelo, who was up in New York at the time."* (R.1544)

In the setting of this case, it must have been clear to the jury that the "Angelo" referred to was Angelo Bertolotti.

The Scope of the Conspiracy

The conspiracy count alleged in the indictment pertains exclusively to cocaine, indeed, insofar as the overt acts are concerned, focus on the planning, carrying out, and ultimate distribution of the proceeds from the Flynn robbery. All of the substantive counts pertain to the distribution of cocaine stolen from Flynn.

However, at trial, the conspiracy theme was played like an accordion by the prosecution, expanded when unrelated drug transactions were sought to be introduced and, after all of this extraneous but highly prejudicial testimony had been admitted, contracted.

In its opening statement, the prosecution articulated its theory that this conspiracy involved cocaine, heroin and marijuana and that its core members were Rossi and Coraluzzo (R.43-4; 49-50).

At the very outset of Rossi's direct examination,

testimony was elicited regarding heroin. A defense objection was overruled on the government's claim that the conspiracy involved heroin and marijuana, not merely cocaine (R.183).

Immediately following that, Rossi testified about a meeting in Florida in July or August, 1973, with Iacono, Browning, and Capotorto, at which there was a discussion about the purchase of 2,500 pounds of marijuana which was being brought in from Colombia (R.184-6). Objection was made to any testimony concerning marijuana. The trial court permitted the testimony, subject to connection (R.186).

Further along, in Rossi's direct examination, objection was again made to his testifying about the distribution of 50 pounds of marijuana from Rossi to Bivens (using Guida as an intermediary) (R.245). It was pointed out the court that since the indictment charged a conspiracy to distribute narcotic drugs and marijuana was not so classified, it could not be within the ambit of the conspiracy (R.246).

The trial court, now somewhat concerned, asked for additional argument on the question without rendering a determination at that time (R.246-7).

Later on in his direct examination, Rossi testified about his first meeting with Bertolotti held at Camperlingo's home in Florida (R.231). Asked what was discussed at that meeting, Rossi stated:

> "Well, at that individual meeting they were making preparation in going to get a shipment of marijuana" (R.321-2).

Objection was made to any testimony concerning marijuana as not relating to the conspiracy charged in the indictment.

The trial court's first response to the objection was the rather enigmatic comment that:

> "I haven't been able to get that" (R.322)

The court then asked to look at the schedules of controlled substances contained in Title 21 of the United States Code, and, after perusing them, summarily overruled the objection (ibid).

A few moments later, Rossi testified that at the meeting just referred to, Camperlingo said that Thompson was getting ready to go to the Bahamas to make payment for marijuana (R.324).

Again objection was unsuccessfully made to any testimony relating to marijuana as being outside the scope of the indictment (R.324-5).

Counsel requested the opportunity to argue a motion at the bench relating to this question and was sharply rebuffed (R.325).

Rossi proceeded to relate how 600 pounds, or more, of marijuana was received by boat in Florida and then transported to New York and sold (R.327-333). At the conclusion of this testimony a motion to strike all of it as being unrelated to the indictment was made and summarily denied (R.335-6).

During the course of the government's direct case, defense counsel requested the trial court "to have the United States Attorney define with some particularity the conspiracy alleged in Count 1 of this indictment" (R.944). The following colloquy ensued:

> "The Court: Well, the problem he is raising is what are the parameters of the conspiracy.
> Mr. Lavin: The parameters are the time from January 1, 1973 until—
> The Court: Any narcotics transaction these people dealt with?
> Mr. Lavin: If they dealt with people involved here, yes." (R.946-7)
>
> * * *
>
> "Mr. Lavin: I mean, the testimony of the witness,

> even from Rossi, it was made clear that this is a single conspiracy involving Mr. Rossi buying and selling narcotics from the individuals on trial.
> The Court: So that the parameters you have are any of the transactions in terms of narcotics in which Mr. Rossi was involved with any of these individuals from 1973 to the filing of the indictment, in narcotics, including cocaine, heroin and marijuana, is part of the conspiracy, is that right? 26
>
> Mr. Lavin: Yes, sir." (R.948)

The attempt by defense counsel, now joined by the trial court, to have the prosecution define the scope of the conspiracy continued (R.963-4).

This time, the government expanded the core group beyond Rossi and Coraluzzo to include Pearson, DeLuca, Browning, Guida, Angley and Flynn (R.965). This core group sold the narcotics to, among others, Bertolotti (R.966).

The trial court clearly adopted both the factual and legal premises underlying the prosecution's view of the conspiracy. Just prior to the conclusion of the government's case, the court denied the various motions for a mistrial and for severances, stating that:

> "The government's thesis is that the defendants, at least several of them, were dealers in narcotics for a continuous period of time in 1973, all kinds of narcotics, cocaine, marijuana, heroin. Thus far the evidence is sufficient to support the government's thesis as to the participation of . . . - Bertolotti . . ." (R.1228).

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26. This was immediately expanded to include any dealings with Coraluzzo (R.949).

The court expressly found that the evidence supported the Government's thesis "of a continous and continual engagement in trafficking in narcotics" (R.1229).

Counsel for Bertolotti moved for a judgment of acquittal or, in the alternative, for a dismissal of the indictment because of improper joinder of defendants at the conclusion of the government's case, based on the theory that the evidence against him related solely to marijuana and that there was insufficient evidence linking him to the cocaine conspiracy charged in the indictment (R.1734-1744). Those motions were renewed at the conclusion of the entire case (R.2187).

After all of the evidence was in, the prosecution did a complete about-face with respect to its position regarding all of the marijuana transactions and the court, for the first time, really came to grips with the very serious problems raised by having admitted all of that testimony.

Counsel for Bertolotti and Camperlingo[27] pointed out to the court at a conference held prior to the charging of the jury that since the conspiracy count alleged an agreement to distribute a narcotic drug, and since marijuana was not so denominated, the jury would have to acquit if they found that they were only dealing in marijuana and not in cocaine (R.2225-7).

The court, addressing itself to the prosecutor, said:

> "My understanding is that the government was contending that all of those transactions [involving] heroin, and the transactions in cocaine and the transaction in marijuana were subsumed under this indictment" (R.2226).

The government's response and the colloquy that followed highlight the error in admitting all of the

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27. For some unknown reason counsel seemed to restrict his concern to Camperlingo. As should be apparent, Bertolotti was in the identical position.

testimony relating to marijuana.

The prosecutor's concern was that if the jury "in their own minds" acquitted Camperlingo of dealing in cocaine, but convicted him based on his dealing in marijuana, how, under this indictment, could they accurately manifest their verdict? (R.2226-7).

The prosecutor's "remedy" was to suggest an instruction that "marijuana is admissible as proof of the narcotics conspiracy"—and if they find only trafficking in marijuana, the jury would have to acquit (R.2227-8).

Other counsel pointed out to the court, as the prosecutor readily acknowledged, that the government had completely reversed its position from one where it successfully urged the admission of all of the marijuana transactions on the ground that it was part and parcel of the charged conspiracy, to the much more limited ground of such transactions being merely probative of membership and participation in the cocaine conspiracy (R.2228-9).

After listening to counsel point up additional problems relating to the Government's changed position,[28] the trial court said to the prosecutor:

> "You better give the matter some thought, because if you are now changing your ground from what I understood, I think we may be in some difficulty. I don't know how we are going to extricate ourselves from it" (R.2230).

At this point, counsel moved for a mistrial based on the admission into evidence of all the marijuana transactions. This rather remarkable colloquy then ensued:

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28. Defense counsel pointed out that the jury should be instructed that they were not to consider any of the acts involving marijuana binding on any of the defendants who were not participants therein (R.2230).

"The Court: I don't regard any marijuana transaction as being prejudicial.
Mr. Katz: They were talking about tons of marijuana.
Mr. Epstein: I objected at that time.
The Court: I know you objected. I don't regard any tons of marijuana as being prejudicial in terms of the present climate of opinion in this country. I don't regard that as being prejudicial. But that is another point. The fact of the matter is in some circles people regard it as not respectable unless you do smoke marijuana" (R.2230-1).

Before the charge conference was concluded, counsel for Guerra moved for a mistrial on the ground that the trial court had failed to caution the jury as to the (now) limited purpose for which evidence of marijuana transactions was being admitted (R.2233). The court replied:

"I am inclined to agree with that." (ibid)

POINT I

THE ADMISSION INTO EVIDENCE OF VARIOUS TRANSACTIONS RELATING TO MARIJUANA WAS IMPROPER.

In *United States v. Brettholz*, 485 F.2d 483, 490 (2d Cir., 1973), a prosecution for conspiring to distribute cocaine, this Court affirmed the trial court's exclusion of all evidence relating to marijuana, holding that:

"The trial court quite properly sustained defense counsel's objection to those exhibits and excluded them, since appellants were not charged in the indictment with any marijuana offenses."
See also, United States v. Falley, 489 F.2d 33 (2d Cir., 1973).

To be sure, this Court on occasion has upheld the discretion of the trial court in permitting the introduction of evidence of uncharged drug transactions, but never on a scale nor for the purpose that such transactions were admitted here.

Thus, in *United States v. Wright*, 466 F.2d 1256 (2d Cir., 1972), a heroin concealment case, this Court permitted the introduction of evidence of cocaine found on a co-defendant's premises where the government could reasonably anticipate, as did ultimately occur, that the defendant would claim that he had no knowledge that such premises were being used to conceal narcotics notwithstanding his presence there when the cocaine was seized. *See also, United States v. Purin*, 486 F.2d 1363, 1367 (2d Cir., 1973).

Unlike *United States v. Stadter*, 336 F.2d 326, 329 (2d Cir., 1964), where such evidence was introduced "with appropriate limiting instructions," evidence of uncharged marijuana transactions was offered and admitted here as an integral part of the charged cocaine conspiracy itself.

While the totality of the evidence introduced against Bertolotti in this three week trial was miniscule, absent the evidence relating to marijuana, it simply disappears.

Under the circumstances of this case, it was reversible error for the trial court to admit evidence of marijuana transactions.

POINT II

THERE WAS NO NON-HEARSAY EVIDENCE OF BERTOLOTTI'S MEMBERSHIP IN THE CHARGED CONSPIRACY TO WARRANT THE ADMISSION OF HEARSAY STATEMENTS OF CO-CONSPIRATORS.

It is the well settled rule in this Circuit that the jury will be permitted to consider the hearsay statements and declarations of co-conspirators only after the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the non-hearsay evidence. See, *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir., 1969); *United States v. Calabro*, 449 F.2d 885 (2d Cir. 1971); *United States v. Cirillo*, 499 F.2d 872 (2d Cir. 1974); *United States v. Santana*, 503 F.2d 710 (2d Cir. 1974).

Regarding Bertolotti's membership and participation in the charged conspiracy, there are the following non-hearsay items of evidence:

1. Rossi's testimony placing him at a meeting in Camperlingo's home in Florida along with Coraluzzo, Capotorto, and Thompson in June or July, 1973. Rossi did not directly attribute one word or act to Bertolotti at that meeting. As already noted, a substantial portion of that meeting related to marijuana. See p. 6, *supra*.

2. Rossi's testimony placing him at another meeting in Florida in July or August, 1973, with Camperlingo, Capotorto, Thompson, Bertolotti, DiGeorgio and Louis Lepore. Again, Rossi did not directly attribute a single word or act to Bertolotti. Virtually the entire conversation, as testified to by Rossi, but for one sentence related to marijuana. See p. 7, *supra*.

This record does not contain a single word supposedly

uttered by Bertolotti.

It is the well settled rule that:

> "While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial . . . mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough."
> *United States v. Cirillo, supra,* at p. 883.

Here, the trial court found, presumably by a fair preponderance of the non-hearsay evidence, that Bertolotti was a participant in the charged conspiracy based on his being at a meeting where:

> "There was an agreement to receive five or six hundred pounds of marijuana in payment of the cocaine which Capotorto and Thompson had bought earlier" (R.1822)

As already pointed out, while Rossi did place Bertolotti at such a meeting, he did not attribute one word of any conversation to him. Moreover, the theme of that meeting related to marijuana, not to cocaine.

It is submitted that *Cirillo* is dispositive here.

There, this Court, in a heroin conspiracy prosecution, reversed the conviction of the defendant Gutierrez where:

1. That defendant was never heard to discuss narcotics with any of the conspirators;

2. Other conspirators visited the defendant's home, but there was no evidence of any narcotics possession nor any evidence of what transpired at those meetings;

3. There was no non-hearsay evidence of any participation by the defendant of any purchase or sale of heroin. 499 F.2d at p. 884.

The only "link" to the charged conspiracy was Rossi's

testimony that when Thompson and Capotorto came up to New York from Florida in May or June, 1973, to purchase cocaine, Capotorto told him that Bertolotti, *inter alia*, had "chipped in" to make the purchase (R.171-2).

That statement was clearly hearsay as to Bertolotti, who was not present when it was made.

In *Cirillo*, the government urged that there was circumstantial evidence in the form of verbal acts by a co-defendant in which the latter told another co-defendant that Gutierrez was the "partner" of a third co-defendant. Rejecting these statements as the basis for a finding of Gutierrez' participation in the conspiracy, this Court said:

> "But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible. Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof."
> *499 F.2d at p. 885*

In *United States v. Cimino*, 321 F.2d 509, 510 (2d Cir. 1963), this Court noted that a co-defendant's statement to an undercover agent that the defendant was the source of the heroin sold to the agent was not competent evidence to establish the defendant's participation in the conspiracy, for, as the Court observed:

> " 'Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence.' "

Falling within this category, if it was admissible at all, was Agent Festa's testimony that Camperlingo had told

him in May, 1974, that before the two of them could do any deal together, Festa would have to be cleared by his "partner"—"Angelo" (R.1544). See p. 19, *supra*.

To begin with, this rank hearsay statement was not made in furtherance of the conspiracy charged in the indictment and was made after Rossi was in federal custody and cooperating with the Government and long after any of the events and incidents relating to the conspiracy had transpired.[29]

As the court itself acknowledged in its charge to the jury,

> "no acts in furtherance of the conspiracy as testified to here postdated January, 1974" (R.2758).

Without, at this juncture questioning the admissibility of Festa's testimony and its prejudicial impact on Bertolotti, suffice it to say that under the circumstances present here, the declaration by Camperlingo that Bertolotti was his "partner" could not and was not made the basis for a finding of Bertolotti's membership in the cocaine conspiracy charged in the indictment.

The trial court acknowledged as much when it cautioned the jury that Festa's testimony (and the tapes) were to be considered by them solely with respect to Camperlingo and Thompson in determining whether as between them and Rossi a conspiracy existed and whether they were members thereof (R.1534).

The facts here are therefore quite different from those found in *United States v. Manfredi*, 488 F.2d 588, 596 (2d Cir., 1973). There, this Court first determined that there was "sufficient independent evidence" to establish the

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29. Rossi was in permanent federal custody on January 25, 1974 (R.2206). While the trial court initially indicated to counsel that it would use that date as the terminal point of the conspiracy (R.2206-7), in its charge, it instructed the jury, in effect, that the conspiracy terminated on June 18, 1974, the date of the filing of the original indictment (R.2743).

defendant's participation in the conspiracy to warrant the introduction of a co-defendant's hearsay statements made to other conspirators that the defendant was the supplier of heroin. Here, it is submitted, the government failed to establish by a fair preponderance of the non-hearsay evidence Bertolotti's participation in the charged conspiracy.

POINT III

THE GOVERNMENT FAILED TO ESTABLISH THE EXISTENCE OF THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT BEYOND A REASONABLE DOUBT.

On October 10, 1974, this Court in *United States v. Sperling*, 506 F.2d 1323, 1340-1, took occasion,

> "to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top."

The original indictment in this case was filed on June 18, 1974 (A.19).[30] On August 2, 1974, counsel for Bertolotti filed a motion for severance (A.25). Some time between

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30. 30 defendants were named in that indictment.

that date and the holding of a pre-trial conference on October 3, 1974, Bertolotti's motion for a severance, as well as similar motions made by various other defendants, was denied.[31]

On January 6, 1975, the day the trial commenced, a superseding indictment was filed (A.6).

29 defendants were named in this indictment, along with a single unindicted co-conspirator. Prior to the prosecution presenting its case, it turned over two lists containing the names of 31 additional persons who it claims were co-conspirators (RP.205).

On that date, motions for a severance were renewed and summarily denied (RP.45-6; 68; 75-7).

On the following day, counsel for Angley moved for a severance based on information contained in reports that had just been turned over by the government which, so he urged, affirmatively established that there were multiple conspiracies present here (RP.206). The motion was summarily denied (ibid). Later on during that same proceeding counsel for DeLuca spoke:

> "MR. MICHAEL WEINSTEIN: Excuse me, Your Honor. Just prior to your calling in the jury—I had intended to do this earlier—on behalf of my client . . . and after reading all that 3500 material that was given to me yesterday, I also want to make a motion for a severance, and I specifically point out to the Court—
> THE COURT: Haven't you made that motion before?
> MR. MICHAEL WEINSTEIN: I submitted it before . . . but I am submitting it on the issue of the 3500 material that was given us last night, and

31. Minutes of October 3, 1974 at pp. 70, 74. These minutes are a part of the original record filed on this appeal.

specifically on the statements in that 3500 material that specifically refer to separate conspiracies. THE COURT: The motion is denied" (RP. 223)

On January 8, 1975, just prior to the opening statements being made, a motion on behalf of all of the defendants[32] was made for a severance and at long last, counsel read to the court excerpts from the report which had only been alluded to on the preceding day (R.30).[33]

That report, which was prepared by Agent James Harris of the Drug Enforcement Administration on June 21, 1974, made explicit reference to two separate conspiracies involving several of the defendants, including Bertolotti. The "Flynn" cocaine episode is there denominated "Conspiracy #1," and Harris pointedly observed that this "conspiracy" is the subject of this (original) indictment. Bertolotti was placed in what Agent Harris classified in "The Guerra Conspiracy, #2," consisting of 3 separate cocaine transactions, the third of which was a sale of 2 kilograms in June, 1973, by Coraluzzo to Capotorto, Camperlingo, Thompson, Ripulone and Bertolotti (A.142).

The report concluded with this rather revealing passage:

> "A number of the defendants in Conspiracy #1 appear in Conspiracy #2. Assistant United States Attorney Lavin,[34] SDNY, may decide to merge these two conspiracies by using the evidence in Conspiracy #2 to support the more extensive Conspiracy #1" (ibid).

After being read Agent Harris' "advisory opinion" to the

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32. R.18.

33. The report itself is set forth in full at A.141-2. It was marked at the trial as Guerra's Exhibit A for identification, and was received on behalf of all defendants (R.32).

34. The prosecutor in the case at bar, Mr. Lavin also participated in the *Sperling* case.

prosecutor, the Court nevertheless felt that it was "premature" to raise the question of multiple conspiracies and that it would have to await the conclusion of the government's case (R.31-2).

Thus, 17 defendants, shadowed by 12 indicted and 32 unindicted co-conspirators, were obliged to go through a three week trial, each fated to be confronted by a mass of unrelated transactions of a highly prejudicial nature of which they had no knowledge and were in no way involved with.

Of course, the government was well aware of this Court's warning in *Sperling* when it proceeded to trial here and, indeed, when it brought the superseding indictment. Cf. *United States v. Miley*, ——F.2d —— (2d Cir., March 19, 1975; slip opinion, at p. 2389 n.10).

If this Court intended its warning to the Government in *Sperling* to ever be heeded, the test of such intention, it is submitted, should be made manifest here.

The Grand Jury's indictment, not the prosecutor's subsequent creativity must fix the parameters of an offense. An even casual reading of the indictment makes clear that the conspiracy found by the Grand Jury, as well as the substantive offenses, relate solely and exclusively to the theft of cocaine from Flynn on September 22, 1973, and the subsequent transportation, repackaging, and ultimate distribution of that cocaine. If such be the case, if that is the single conspiracy charged, then this Court need not proceed any further with respect to Bertolotti. For there is simply not a shred of evidence which even remotely links him to any phase or facet of those transactions or activities.

The last time Bertolotti's name was mentioned by Rossi was in connection with a meeting held in July or August, 1973—a meeting which had nothing whatsoever to do with Flynn or his cocaine (R.327).

Assuming, *arguendo*, that the parameters of the con-

spiracy are not what the Grand Jury would appear to have fixed but those claimed by the prosecution, namely, any and all cocaine or heroin transactions with the core group during 1973, then Bertolotti's conviction cannot stand because the evidence clearly established multiple conspiracies.

The evidence makes it quite apparent that Rossi and Coraluzzo were not narcotics dealers but robbers. To apply the "chain" conspiracy rationale found in such narcotics cases as *United States v. Agueci,* 310 F.2d 817, 826 (2d Cir., 1962) would be absurd.

The "chain" conspiracy was there described as being "dictated by a division of labor at the various functional levels—exportation of the drug" from a foreign source—"and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user."

It is ludicrous to suggest that the evidence in this case:

> "established the existence of one large conspiracy to distribute enormous amounts of heroin and cocaine for profit."
> *United States v. Sperling, supra,* at p. 1340.

Such leading "chain" conspiracy cases as *United States v. Bynum,* 485 F.2d 490 (2d Cir., 1973); *United States v. Santana, supra; United States v. Mallah,* 503 F.2d 971 (2d Cir., 1974); and *Sperling, supra,* simply have no applicability to this case.

In *Bynum,* for example,

> ". . . the core operators . . . supplied the capital and the contact with the suppliers who provided the raw material." (at p. 495)
>
> * * *
>
> ". . . each level of the operation depends upon the existence of the other, and the mutual in-

terdependence of each is fully understood and appreciated by the other" (ibid)

* * *

"The supplier defendants . . . could not reasonably suppose that the large amounts of raw cocaine and heroin received (by the core defendants) were not to be resold at tremendous profits . . ." (at pp. 495-6)

* * *

"The defendants . . . who participated in the cutting, repackaging, and distribution of the drugs understood fully the roles of [the core group] and that suppliers of the raw drugs had to be involved" (at p. 496)

* * *

"The on-going nature of the partnership here and the roles assigned to the cast were established clearly in the record" (ibid)

This Court there observed that:

"This is the usual chain conspiracy encountered in drug cases" (ibid)

But for the distribution of the cocaine stolen from Flynn, there was virtually no evidence of cocaine or heroin trafficking by the core group.

Rossi and Coraluzzo, as well as the other members of the core group were essentially engaged in stealing money from potential buyers on the pretext of selling them narcotics. They did that to Frank Lucas; Frank Matthews, and Harold Harrison; and even to Camperlingo.

There was no evidence here of any "integrated and continuing conspiracy"[35] between the Rossi-Coraluzzo group and any other "group" or individual.

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35. *United States v. Sperling, supra,* at p. 1340.

To paraphrase this Court's recent ruling in *United States v. Miley, supra,* at p. 2389:

> "The operations centered about [Rossi and Coraluzzo] could scarcely be attributed to any real organization, even a 'loose knit' one."

Even accepting the government's premise that Rossi fully intended to supply drugs at the outset of his negotiations with the various persons whose money he ultimately stole, each transaction was a completely independent one.

Thus, with respect to the Matthews-Harrison "rip-off," Rossi testified that he had made arrangements for the acquisition of the 50 kilograms of heroin, for which he had received $350,000, from two individuals called "Dom Boy" and "Louis," whose last names, addresses, or phone numbers he could not remember (R.671-2).

The Rossi "rip-off" of $30,000 from Lucas on the pretext of ultimately selling him 10 kilograms of heroin involved Mengrone as the duped intermediary (R.340-1). Involved in this "transaction" were Browning, who prepared pancake mix as a substitute for the heroin;[36] Louis Lepore; Guerra; and Coraluzzo.[37]

And, as already set forth, the theft of cocaine from Flynn in September, 1973, involved yet another cast of characters. See p. 10, *supra.*

The absurdity of the prosecution's position that those "transactions" were part of a single, overall conspiracy to distribute cocaine and heroin is made manifest when the very victims of the Rossi-inspired thefts of money, Mengrone; Lucas; Matthews; Samuels; and Harrison, were all named as unindicted co-conspirators. To compound

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36. R. 693-5.

37. Rossi testified that Coraluzzo had previously stolen money from Mengrone on the pretext of delivering drugs (R.683-4).

that absurdity, Franklin Flynn, the man whose cocaine was stolen at gunpoint by Rossi and group was indicted and charged with conspiring with Bertolotti and the 28 other defendants to distribute that very cocaine.

Accepting, as we now must, that Bertolotti was a part owner of the cocaine purchased from Rossi and Coraluzzo by Thompson and Capotorto in May or June, 1973, the question remains whether that transaction was part of "a regular business on a steady basis"[38] with the Rossi-Coraluzzo "group."

That this, at most, was an isolated transaction and that Bertolotti was scarcely a part of Rossi's "distribution network" is made crystal clear by the fact that when Rossi did finally obtain a large quantity of cocaine as a result of robbing Flynn, Bertolotti was in no way involved with its distribution.

Not only was Bertolotti completely unaware of the activities being carried on by Rossi and his group, he was their victim. If Bertolotti was Camperlingo's partner, as Festa testified, then he too suffered from Rossi's depredations—the delivery of a large quantity of marijuana for which Rossi made no payment. See p. 8, *supra.*

In sum, the Bertolotti-Camperlingo-Thompson-Capotorto purchase of 2 kilograms of cocaine from Rossi in May or June, 1973, bore no relationship to any "organization" headed by Rossi; was not part of any continuing business relationship; and had nothing to do with the conspiracy charged in the indictment.

a. Prejudice to Bertolotti

It is recognized that a variance between the offense charged in the indictment and the proof adduced at trial does not automatically require reversal.

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38. *United States v. Bynum, supra,* at p. 497.

> ". . . the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights." *United States v. Agueci, supra,* at p. 827.

The prejudice to Bertolotti resulting from the introduction of a mass of hearsay testimony, physical evidence, and wiretap conversations which in no way related to him, was monumental.

He was obliged to sit through nearly 3 weeks of a trial during which his name was mentioned perhaps on 3 occasions.

The bulk of Rossi's testimony related to the Flynn robbery and the efforts on his part and on the part of his associates to secrete, repackage, and then distribute the stolen cocaine. Yet, there was absolutely no evidence of Bertolotti's participation in any of those activities.

There were several witnesses, including the actual buyer and federal narcotics agents, who testified as to a sale of a portion of the Flynn cocaine made by Angley, coupled with the introduction of a cigarette box containing cocaine. That exhibit was the only physical evidence of drugs introduced at the trial.

Although his name was never even mentioned in one of the taped telephone conversations, Bertolotti was taxed with 50 such conversations (accompanied by transcripts) relating to the Lucas-Mengrone "rip-off." Those tapes were filled with the vilest language; replete with ethnic and racial slurs; and contained dire threats and promises of assassinations and kidnappings.

He was saddled with a host of heroin and cocaine transactions with which he had not the remotest connection. He was further burdened by lengthy descriptions of robberies and thefts of huge sums of money by Rossi and Coraluzzo, concerning which there was no proof of his interest, participation, complicity, or even knowledge.

And finally, he was injured, perhaps fatally, by the admission of evidence, later acknowledged by both court and prosecutor to have been erroneously admitted, relating to his participation in dealings in marijuana.

Moreover, Agent Festa, over vigorous objections[39] testified about conversations with Camperlingo and Thompson in May, 1974. During the course of that testimony, he stated that Camperlingo had told him that before they could have any dealings together he would have to be cleared by his "partner," "Angelo." See p. 19, *supra.*

While the court did instruct the jury at the time that testimony was let in as to the limited use for which it was admitted,[40] when it charged the jury as to the prosecution's contentions, it brought Camperlingo and Bertolotti together in a manner which gave verisimilitude to Festa's impermissible interjection of Bertolotti's name, thereby vitiating the effect of its prior limiting instruction.

The court noted that the government contended:

> "That Joseph Camperlingo and Angelo Bertolotti were partners . . . and that in addition Camperlingo's taped conversation with Special Agent George Festa in May of 1974 is proof of Camperlingo's knowledge of the existence of the conspiracy and is proof of Camperlingo's knowledge and intent as to the aims and purposes of the conspiracy" (R.2761)

To begin with, whatever limited probative value the Festa testimony and tapes had was far outweighed by the

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39. R. 1532-3; 1548. A motion to strike all of his testimony or, in the alternative, to instruct the jury that the Agent's statements concerning his "role" in any drug transaction could not be considered by the jury as being in furtherance of the conspiracy, was denied (R.1548-9). Other counsel objected on *Bruton* grounds (R. 1549). Motion for severance based on *Bruton* grounds as well as a motion for a mistrial were denied (R.1563-4).

40. R. 1534. It was admitted as to Camperlingo and Thompson only.

prejudice resulting not only to Camperlingo and Thompson, but especially to Bertolotti.

Clearly, the "Angelo" referred to as Camperlingo's partner was quickly discerned by the jury to be Bertolotti. Unredacted, Festa's testimony was a patent violation of the rule enunciated in *Bruton v. United States*, 391 U.S. 123 (1968). The limiting instruction was hardly an "adequate substitute" for Bertolotti's constitutional right to cross-examine Camperlingo who, of course, did not testify.

That Bertolotti was seriously prejudiced by all of the foregoing cannot seriously be questioned.

b. *The Charge Relating to Multiple Conspiracies*

This Court in *United States v. Borelli*, 336 F.2d 376 (2d Cir., 1964), and *United States v. Kelly*, 349 F.2d 720 (2d Cir., 1965) established standards and requirements regarding a trial court's charge where the issue of multiple conspiracies is present.

In *United States v. Calabro, supra*, at pp. 893-4, this Court placed the following gloss on *Kelly* and *Borelli*:

> "*Kelly* requires that the jury clearly recognize the difference between the evidence against each defendant."
>
> "[*Borelli*] . . . held that 'where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the court must appropriately focus the jury's attention on the issue rather than allow it to decide on an all or nothing basis as to all defendants'."

It is submitted that the charge given in this case failed to meet those standards.

After instructing the jury in general terms about the nature of a conspiracy, the court focused on the multiple conspiracies issue, as follows:

> "It is contended here that the government has failed to prove the existence of only one alleged conspiracy but has proved several separate and independent alleged conspiracies involving various of the defendants. Proof of such several separate and independent conspiracies is not proof of the single overall conspiracy as charged in the indictment, and if you find that the government has failed to prove the existence of only one overall conspiracy, you must find the defendants not guilty" (R.2746).[41]

This is precisely the "all or nothing" charge condemned in *Kelly* and *Borelli*. Unlike the trial courts in *United States v. Guanti*, 421 F.2d 792, 800 (2d Cir., 1970), and *United States v. Calabro, supra*, at p. 894, the court below never expressly told the jury in the context of its discussion of multiple conspiracies that they "could convict some, all, or none of the defendants as members of the conspiracy."[42]

After giving its "all or nothing" instruction, the court went on to charge that:

> "In determining whether there was a single overall conspiracy, you may consider what the evidence shows as to time, parties, or objects, and changes of personnel and activity" (R.2746-7).

The court then charged that a single conspiracy could be found "even though there were changes in personnel and activities," as long as "the purposes of the alleged conspiracy continued to be those charged in the indictment" (R.2747).

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41. This was specifically excepted to. R.2797-9.

42. At a much later phase of the charge, the court instructed the jury regarding certain "general considerations" and told them that it was their "duty to give separate, personal consideration to the case of each defendant" as to each count (R.2777).

But the court never defined for the jury what the scope of the charged conspiracy was, nor did it ever focus the jury's attention "on the importance of their determining whether each defendant joined the conspiracy and the scope of his agreement." *United States v. Sperling, supra,* at p. 1341.

Its discussion of the existence of the conspiracy as an essential element of the offense is utterly bereft of any instructions relating to the nature and scope of the conspiracy charged, other than to state that it involved the distribution of cocaine and heroin, and not marijuana (R.2742-8).

In discussing the second essential element of the offense, the court instructed the jury that once it found the existence of "a conspiracy," it would have to consider whether each defendant "became a participant in the conspiracy with knowledge of its alleged criminal purpose" (R.2748-9).

There was literally not one word said about the scope of each defendant's agreement as required by *Borelli* (R.2748-51).

Given the acknowledged confusion as to the nature of the conspiracy charged, it was crucial for the trial court to focus the jury's attention on the scope of each defendant's agreement, and the failure to do so constitutes plain error.

POINT IV

APPELLANT BERTOLOTTI JOINS IN EACH OF THE POINTS OF LAW RAISED BY THE OTHER APPELLANTS, WHERE APPLICABLE TO HIM AND NOT INCONSISTENT WITH ANY CONTENTIONS ASSERTED HERE.

CONCLUSION

For all of the foregoing reasons, the appellant Bertolotti's judgment of conviction should be reversed and the indictment dismissed, or in the alternative, a new trial should be granted.

Respectfully submitted,

SANFORD M. KATZ,
Attorney for Appellant
299 Broadway
New York, N.Y. 10007
(212) 349-7755

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of June, 19 74 at No. 51 Courthouse, B+C deponent served the within Brief upon the Attorneys the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 7 day of June 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973